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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 629

WILLIAM M. GILDAY, JR.,
PETITIONER,

v.

PALMER C. SCAFATI,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the court of appeals is not yet reported. (Pet. App. A pp. 55-63) The memorandum opinion of the district court is not reported. (Pet. App. A pp. 14-54).

Jurisdiction

The judgment of the court of apeals was entered on June 24, 1970. The petition for a writ of certiorari was filed on September 1, 1970. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the admission of three convictions (subsequently found to have been obtained in the absence of counsel) solely for the purpose of impeaching petitioner's credibility was properly found by the Court below to be harmless beyond a reasonable doubt?

2. Whether the rationale of *Burgett* v. *Texas*, 389 U.S. 109, prevents the use of "uncounseled" convictions used solely to impeach a criminal defendant's credibility?

3. Whether the rationale of *Burgett* applies to criminal trials conducted prior to the Court's decision, in which "uncounseled" convictions were used solely to impeach a defendant's credibility?

Statement of the Case

Petitioner was convicted in the Essex Superior Court of Massachusetts in March of 1964 for armed robbery on August 18, 1963, and sentenced to a term of from 15 to 25 years, to be served at the Massachusetts Correctional Institution at Walpole. Petitioner's conviction, and that of a co-defendant, Bowlen, were affirmed on appeal. *Commonwealth* v. *Bowlen*, 351 Mass. 655 (1967). After this Court's decision in *Burgett* v. *Texas*, 389 U.S. 109, one of the issues unsuccessfully raised on appeal, the use at trial of prior convictions obtained in the absence of counsel to impeach petitioner's credibility, was raised on a petition for a writ of error in the Supreme Judicial Court of Massachusetts. *Gilday* v. *Commonwealth*, 1969 Mass. Adv. Sheets 718. After a hearing on the merits before a single justice of the Supreme Judicial Court, the case was reserved and reported to the Full Bench. In a reseript opinion, the Full Bench reaffirmed the conviction on the ground that any error in admitting the prior convictions in evidence was "harmless

beyond a reasonable doubt." *Gilday* v. *Commonwealth*, *supra*.

A petition for habeas corpus was then brought in the United States District Court for the District of Massachusetts. The presiding judge, after reviewing the entire state court transcript of the trial and other state court proceedings, found that the admission of the "uncounseled" convictions for purpose of impeachment was "harmless beyond a reasonable doubt." (Pet. App. A pp. 14-54). The First Circuit affirmed. (Pet. App. pp. 55-63).

The Commonwealth's evidence showed that the robbery for which petitioner was convicted occurred on Saturday afternoon, August 17, 1963, in Haverhill, Massachusetts. The principal victim, one Theofilopoulos, operated a neighborhood variety store (Tr. 152, 153).[1] According to the victim and two customers who were present, Samoisette and White, petitioner, and second man later identified as Bowlen entered the store at about 6:30 p.m., and with drawn guns, robbed the proprietor of the contents of his wallet, the cash register, and two customers of lesser amounts (Tr. 160-161; 306; 370).

On the following afternoon, Sunday, August 18, 1969, petitioner was involved in an automobile accident in Middleton, Massachusetts (Tr. 75, 76). Shortly after the accident, the Middleton Police arrived on the scene (Tr. 17). Petitioner and the police stayed at the accident scene until approximately 5:45 p.m., at which time petitioner was placed under arrest for driving a motor vehicle without having a driver's licence in his possession, and other charges (Tr. 23, 55, 56, 57, 121, 126). After hospital treatment for injuries suffered in the accident (Tr. 24), petitioner was taken to the Danvers Police Station, which is used as a lockup by the Middleton Police (Tr. 25). He

[1] References are to the Hearing on the Motion To Suppress ("M. Tr.") and the trial transcript (Tr.).

arrived at the police station about 6:30 p.m., where he was booked and subjected to a search. The search revealed that he had approximately $1,700 in currency in his pockets (M. Tr. 25, 26, 27). The cash and some other items of personal property were retained by the Middleton Police (Tr. 26).

The Middleton police notified the Haverhill police of the discovery of the large sum of money in petitioner's possession (M. Tr. 29, 30). A Haverhill police inspector contacted the main victim, Theofilopoulos, and drove him to the Danvers Station (Tr. 495). He did not tell Theofilopoulos about the money which had been found in petitioner's pockets (Tr. 499). On the night of the holdup, Theofilopoulos had told the Haverhill Police that he had written the figure "76" with a red ballpoint pen on one of the bills taken from him by the robbers (Tr. 512). Upon arriving at the station, the victim observed petitioner, who was alone in a room at the time, and identified him as one of the robbers (Tr. 497, 498). Thereafter, the victim and the officer examined the money which had been taken from petitioner's pockets. They found among it the bill with the distinctive marking, and the victim also found approximately the same number of large bills as had been taken from him the previous afternoon (Tr. 508, 509, 510).

Other prosecution evidence included testimony by one Mrs. Vlohos that she had seen petitioner, on August 17, 1963, at approximately the time of the robbery, get into a car near Theofilopoulos' store and sit in it for three or four minutes before being joined by a man later identified as Bowden (Tr. 437, 438, 439, 440). Mrs. Vlohos' description of petitioner as wearing distinctive, wraparound style sunglasses, corroborated a description of petitioner given by witnesses who were in the store at the time of the robbery (Tr. 166, 167, 309, 310, 311, 370, 439, 440). A pharmacist, Aronson, testified that, during the early afternoon of August 18, 1963, petitioner visited his store and, in his

presence, counted the currency in his pockets, reaching a total of somewhat in excess of $1,700; that before leaving the store, petitioner inspected the sunglasses on display at a rack and tried some of them on, but did not buy any; and that, after petitioner had left the store, he found near the sunglasses, a pair of wraparound sunglasses which matched generally the description given by witnesses to the robbery (Tr. 89, 94, 95, 96, 97). Later that same afternoon, when petitioner drove his automobile off the highway, a motorist, coming to his aid, asked him if he was hurt, and petitioner replied that he was not. The motorist then asked, "Well, you want me to call the police, or a wrecker?" Petitioner replied, "Well, you might just as well, because I'm done for now." (Tr. 77).

B. Petitioner took the stand in his own defense. Toward the end of petitioner's testimony on cross-examination, the prosecuting attorney elicited admissions from him that he was the same Gilday who had been convicted of five previous offenses, as follows: (a) on February 14, 1955, attempted theft of a handbag, resulting in a sentence of 4 to 5 years at Massachusetts Correctional Institution at Walpole (Tr. 671), (b) on February 14, 1955, while armed with a rifle, robbery from the person of a different individual of $40, resulting in a 10 to 20 year sentence at the same institution (Tr. 672), (c) on March 20, 1954, assault and battery, in the Second District Court of Essex at Amesbury, Massachusetts, with a sentence of 3 months, suspended, and probation for one year (Tr. 672), (d) on August 5, 1953, in Municipal Court for the City of Duluth, Minnesota, carrying concealed weapons, resulting in a sentence of 30 days at the County Jail and weapons ordered confiscated (Tr. 673) and (e) on September 12, 1951, in Court of Common Pleas, Greene County, Ohio, breaking and entering into a sporting goods store in the nighttime and stealing certain pistols, shotguns, revolvers and mis-

cellaneous sporting goods of value of $2,060, at Fairborn, Ohio, resulting in a sentence of probation for one year (Tr. 673). Petitioner did not object to the introduction of convictions (a), (b), and (c). He objected and excepted to the admission of (d) and (e). In prior proceedings (c), (d), and (e), he had not been represented by counsel.

Argument

I. The Admission of the Three Uncounseled Convictions Solely to Impeach the Defendant's Testimony was Properly Found by the Court to be "Harmless Beyond Reasonable Doubt."

Petitioner does not challenge the factual findings made by the Courts below. Defendant's only contention before this Court is that the "harmless error" doctrine can not be applied to any situation involving the use of constitutionally infirm convictions. (Pet. App. p. 3 n.1) The Supreme Judicial Court of Massachusetts and the First Circuit disagreed.

In *Chapman* v. *California*, 386 U.S. 18, 23-24, this Court said that error — even constitutional error — does not require automatic reversal of a conviction where it was harmless beyond reasonable doubt. We are aware of no cases which have departed from this view.

Although it has been held that violation of the right to counsel (*Gideon* v. *Wainwright*, 372 U.S. 335) can never be harmless (See *Chapman* v. *California*, Supra at 23 n.8), the absence of counsel at certain stages of a trial has been found to be harmless, indicating a reluctance to adopt the "per se" approach of *Gideon* to every situation involving the right to counsel. *Cf. Hamilton* v. *Alabama*, 368 U.S. at 54 n.4, see also *Chin Kee* v. *Commonwealth of Massachusetts*, 407 F.2d 10 (C.A. 1, 1969) cert. denied, 395 U.S. 982.

This case involves the use of "uncounseled" convictions solely to impeach the petitioner's credibility. *Burgett* v.

Texas, 389 U.S. 109 involves their use in a one stage recidivist trial to enhance the penalty provided upon conviction. There is no suggestion in *Burgett* that the Court's refusal to find "harmless error" represented adoption of the "per se" approach to such violations.

Petitioners suggestion that a "burgeoning conflict" exists between the various Courts of Appeal is entirely without merit. Those circuits alleged to have concluded that *Burgett* errors are not subject to "harmless error" analysis have not yet found it necessary to reach that question. Moreover, the First Circuit is the only circuit to determine that the rationale of *Burgett* applies to situations where "uncounseled" convictions are introduced solely for impeachment purposes.

We believe, as did the Court below, that. . . "a violation of *Burgett* simply does not necessarily pervade and distort the entire proceeding in the same manner that ... the denial of counsel at the trial in question does." (Pet. App. AP. 59)

The evidence adduced at the trial clearly established petitioner's guilt. He was identified by several eyewitnesses as one of the robbers having a gun. While petitioner testified that he entered the store at 5 p.m., two witnesses, whom he called, although not able to identify petitioner as one of the participants, were certain that the armed robbery had occurred around 6:30 p.m., and were able to identify co-defendant Bowlen. Petitioner admitted having been with Bowlen throughout the times in question. At the time of his arrest, on the day following the robbery, petitioner had on his person approximately the same amount of cash as had been stolen. One of the bills on his person, bearing the distinctive "76" marking, was readily identified by the victim Theofilopoulos as having been stolen from him. On the night of the holdup, the victim had told the Haverhill Police that he had written

the figure "76" with a red ballpoint pen on one of the bills taken from him by the robbers. The witness Aronson testified that petitioner, in the early afternoon of the day following the robbery, had, in his presence, counted the currency in his pockets, reaching a total in excess of $1,700 and that the petitioner left behind in Aronson's store when he departed, a pair of wraparound sunglasses which matched the description of those worn by petitioner according to witnesses at the robbery. Later that same afternoon, when petitioner drove his automobile off the highway in Middleton, witness Allen, coming to his aid, asked him if he was hurt, and petitioner replied that he was not. Allen then asked, "Well, you want me to call the police, or a wrecker?" Petitioner replied, "Well you might just as well, because I'm done for now." This admission, coupled with the evidence summarized above, clearly supports a finding of petitioner's guilt. A factor for the court's consideration in determining harmlessness of error is overwhelming evidence of guilt. *Harrington v. California*, 395 U.S. 250, 254-55. On the other hand, the "uncounseled" convictions had a minimal effect on petitioner's credibility. More specifically, the Court below stated

> . . .Petitioner's credibility was so severely impaired by his own testimony, the testimony of some of the witnesses he called to the stand, and by the proper admission of two more recent felony convictions, that the admission of the three uncounseled convictions for purposes of impeachment was surely inconsequential." (Pet. App. A, P. 62)

Unless this Court will now. . . "adopt the minority view in *Chapman* (386 U.S. 42-45) that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of evidence", the conviction of Petitioner should be left undisturbed.

II. In the Event That the Court is of the Opinion That the "Harmless Error" Doctrine Was Improperly Applied, it is Nevertheless Clear That the Use of "Uncounseled" Convictions Solely For Impeachment is Not Within the Proscription of *Burgett*.

This Court has never held that it is constitutional error to introduce "uncounseled" convictions for the purpose of impeaching credibility. Every Court of Appeal case cited by petitioner concerned the effect of an "uncounseled" conviction relied upon by the prosecution to increase the penalty provided in a "recidivist" trial. No such scheme is involved here. Massachusetts Law explicitly limited the admissibility of prior convictions to impeachment purposes. See Massachusetts General Law, Chapter 233 §21. It seems clear to us that considerations, apart from speculative effect on the fact finding process, are involved here. In this regard, the present case is analogous to those dealing with the admissibility of prior convictions—for purposes of impeachment—which are pending on appeal. A majority of state and federal jurisdictions have concluded that prior convictions—even though they are pending on appeal—are valid "unless and until" they are set aside or reversed, and that such convictions are therefore admissible for purposes of impeachment. *State* v. *Johnson*, 99 Ariz. 52, 496 P.2d 403 (1965); *Hackett* v. *Freeman*, 103 Iowa 296, 72 N.W. 528 (1897); *Manning* v. *State*, 7 Okla. Crim. Rep. 367, 123 P. 1029 (1912); *People* v. *Barney*, 89 Ill. App. 2d 186, 232 N.E. 2d 481 (1967); *Latikos* v. *State*, 17 Ala. Supp. 655, 88 So. 47 (1921); *People* v. *Braun*, 14 Cal. 2d 1, 92 P.2d 402 (1939); *In Re Abrams*, 36 Ohio App. 384, 173 N.E. 312 (1930); *State* v. *Crawford*, 60 Utah 6, 206 Pac. 717 (1922); *United States* v. *Newman*, 331 F.2d 968 (8th Cir. 1964), certiorari denied, 379 U.S. 975 (1965);

Block v. *United States*, 226 F.2d 185 (9th Cir. 1955). Indeed, the prevailing rule is that the same rule obtains even if the prior conviction is subsequently reversed by the appellate Court. *People* v. *Barney*, *supra*; *Bloch* v. *United States*, 238 F.2d 631 (9th Cir. 1959); see also, *Latikos* v. *State*, *supra*; *People* v. *Brau*, *supra*; *Manning* v. *State*, *supra*; *In Re Abrams*, *supra*; and *State* v. *Crawford*, *supra*. Unless prior convictions have been vacated by a court of competent jurisdiction their admission for the limited purpose of impeachment is not within the proscription of *Burgett*.

III. The Burgett Holding—to the Extent That it May be Applicable to Prior Convictions Introduced for the Purposes of Impeaching Credibility—Should Not be Applied Retrospectively.

The Supreme Judicial Court in *Gilday* v. *Commonwealth*, *supra*, ruled that in the future no prior conviction obtained in the absence of counsel shall be used for purposes of impeachment unless it can be shown that the witness "had or waived counsel in the proceedings certified by the record." But, whatever may be the impelling reason for the *Burgett* doctrine, *Burgett* should clearly not be applied retrospectively because of the undue burden it would impose upon the administration of criminal justice in the Commonwealth of Massachusetts, and elsewhere. See *Sublisky* v. *Commonwealth of Massachusetts*, 412 F.2d 691, 692 (1st Cir. 1969).

In refusing to give the "no comment rule" of *Griffin* v. *California*, 380 U.S. 609 (1965) retrospective application in the case of *Tehan* v. *United States ex rel Shott*, 382 U.S. 406 (1968), the Supreme Court of the United States indicated that their refusal to do so was based upon the ". . .impact upon the administration of their (referring

to the states) criminal law so devastating as to need no elaboration." 382 U.S. at 419. See also *Linkletter* v. *Walker*, 381 U.S. 618, 636 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966); *Stovall* v. *Denno, Warden*, 388 U.S. 293, 297 (1967). To say collateral attacks are permissible on convictions obtained prior to when the *Burgett* case was decided (November 13, 1967) would raise doubts as to the validity of the thousands of convictions in cases where the defendant took the witness stand and was impeached by use of prior conviction. The result would undoubtedly mean that the courts of the Commonwealth, as well as other states, would be clogged with challenges, most of which would be altogether specious and render successful retrials in most cases impossible due to the unavailability of witnesses and evidence due to the passage of time. Respondent, therefore, respectfully submits that the *Burgett* rule should not be applied retrospectively to the instant case.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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